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**IN THE
COURT OF APPEALS OF INDIANA**

JIMMY DALE EDWARDS,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 53A05-0509-CR-537

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Douglas R. Bridges, Judge
Cause No.53C02-9901-CF-48

AUGUST 28, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Defendant-Appellant Jimmy Dale Edwards (“Defendant”) appeals from the trial court’s sentencing order after his conviction following a jury trial of criminal confinement, Ind. Code §35-42-3-3; and resisting law enforcement, Ind. Code §35-44-3-3.

The facts most favorable to the jury’s verdict are as follows. On July 26, 2004, C.S., the victim, was working as a caretaker for a sixteen-year-old boy with disabilities. C.S. took the boy to Lake Monroe on that date because the boy liked to swim. Upon their arrival, C.S. noticed Defendant sitting in a red convertible in the parking lot area with his car door open. C.S. and the boy walked down to the lake, stayed approximately ten minutes, and then returned to C.S.’s car because it was unusually cold on that day and not suitable for swimming.

When C.S. and the boy returned from the lake, Defendant yelled to C.S. that he needed help. When C.S. walked over to the car, Defendant indicated that he needed her to turn the ignition switch while he watched. C.S. walked over to the driver’s side door, which was open, leaned in, and turned the ignition key. The car’s engine started.

Defendant then pushed C.S. and said “Get in here.” C.S. observed a knife in Defendant’s right hand. C.S. attempted to exit the driver’s side door area, but Defendant blocked her exit. C.S. ended up inside the car with her head down near the passenger’s side floorboards. Defendant attempted to bind C.S.’s legs, but C.S. prevented Defendant from doing so by kicking and screaming. Defendant then began to strangle C.S. with his hands. C.S. scratched Defendant’s face and poked him, while still screaming. Defendant told C.S. he was going to kill her. C.S. opened the passenger-side car door, and managed

to escape the vehicle while Defendant continued to attempt to pull C.S. back into the vehicle. Defendant was backing the car up while C.S. escaped. C. S. was able to retrieve her cell phone and wallet from the passenger seat of Defendant's car before running toward her car.

C.S. called the Monroe County 911 dispatcher to report what had happened, and then drove to the entrance of the lake until Monroe County Sheriff's Detective Brad Swain arrived. The dispatcher broadcast C.S.'s description of Defendant's vehicle. Sergeant Ann Maxwell, who was on patrol in the area of Lake Monroe, heard the dispatch and observed a red convertible matching the broadcast description traveling at a high rate of speed toward her. Sergeant Maxwell activated the emergency lights and pursued Defendant's vehicle catching it after going around several sharp curves. Ultimately, Defendant ran from the vehicle, which had sustained significant body damage. Sergeant Maxwell yelled, "Sheriff's Department, stop," but Defendant did not stop. Sergeant Maxwell pursued Defendant on foot, but Defendant escaped. A K-9 unit brought to the scene lost Defendant's trail. C.S. was brought to the scene where she was able to identify the car. Police officers recovered C.S.'s lip balm, a Slimfast bar, and a shoe C.S. lost during her struggle to escape from Defendant's car.

Defendant was arrested the following day and charged with attempted murder, criminal confinement, resisting law enforcement, and the status offense of being a habitual offender.

Defendant's jury trial began on June 15, 2005. On June 17, 2005, the jury found Defendant guilty of criminal confinement as a Class B felony, and resisting law

enforcement, as a Class D felony. The State ultimately dismissed the count alleging that Defendant committed the offense of attempted murder after the jury failed to reach an agreement about that count. Defendant admitted to his status as an habitual offender.

The trial court sentenced Defendant on August 4, 2005. The trial court sentenced Defendant to a term of eighteen years' imprisonment on the criminal confinement conviction, a term of three years' imprisonment on the resisting law enforcement conviction, a term of twenty-five years' imprisonment on the habitual offender admission, all executed, to be served consecutively. The trial court ordered costs and fees totaling \$856.00. This appeal followed.

Defendant claims that the trial court committed numerous reversible errors when sentencing Defendant in the instant action. In response to one of those allegations, the State concedes that the trial court erred by ordering the sentence for the habitual offender determination to be served consecutively to the other sentences. When defendants are convicted of multiple offenses and are found to be habitual offenders, trial courts must impose the penalty enhancement upon only one of the underlying felony convictions, and must specify the conviction to be enhanced. *McIntire v. State*, 717 N.E.2d 96, 102 (Ind. 1999). Failure to specify which conviction is to be enhanced, requires that the court on review remand the case to the trial court to correct the sentence as it pertains to the habitual offender determination. *Id.* A habitual offender finding does not constitute a separate crime nor does it result in a separate sentence. *Hendrix v. State*, 759 N.E.2d 1045, 1048 (Ind. 2001). A habitual offender finding results in a sentence enhancement imposed upon the conviction of a subsequent felony. *Id.* The trial court erred and the

matter is remanded for a specification of which felony is to be enhanced by the habitual offender admission, and appropriate sentencing thereon.

Further, the State concedes that the case should be remanded to the trial court for a hearing to determining the costs and fees that the trial court could properly impose and to determine whether Defendant has the ability to pay the costs and fees. Defendant challenges the propriety of the imposition of the costs and fees against him in this case.

The trial court ordered Defendant to pay a total of \$856.00 in fees and costs. Of those costs, \$150.00 was for public defender reimbursement. \$100.00 was for a probation user's fee. Another \$100.00 was designated as an administrative fee. The alcohol/drug program user's fee was \$350.00. \$156.00 was assessed for "costs."

However, the trial court did not identify for the record the specific statutory authority for imposition of the costs and fees. Since, Defendant's sentence was to be served fully executed, the trial court may have lacked the authority to order Defendant to pay the probation user's fee. *See* Ind. Code §35-38-2-1. While Defendant did admit to having a substance abuse problem, Defendant was not convicted of an offense under Ind. Code §35-48-4-1 *et seq.* Therefore, the trial court may have erred by imposing the alcohol/drug program user's fee. Further, the trial court did not make a finding regarding Defendant's ability to pay the costs and fees. Therefore, this matter is remanded to the trial court for a clarification of the costs and fees imposed and specification of the statutory authority for imposition of the fees. The trial court should also hold a hearing to determine Defendant's ability to pay those costs and fees properly imposed.

Defendant also alleges that changes made to Ind. Code §35-50-2-1.3(c), when read with Ind. Code §35-50-1-2(c), limit the trial court's power to impose consecutive sentences. The effective date of the changes to the statute occurred after commission of the crimes and prior to Defendant's conviction and sentencing. Defendant argues, the changes in the statute are ameliorative in nature, and should have applied to Defendant's sentencing.

In general, the sentencing statute in effect at the time of the commission of the crime provides the property penalty for commission of the crime. *White v. State*, 849 N.E.2d 735, 741 (Ind. Ct. App. 2006). Ind. Code §35-50-2-1.3 went into effect on April 25, 2005. In the present case, the offenses were committed on July 26, 2004. Therefore, Defendant would not be eligible to receive the benefit of the new statute, if there is a benefit to be received, unless the doctrine of amelioration applied.

The doctrine of amelioration provides that a defendant who is sentenced after the effective date of a statute providing for more lenient sentencing is entitled to be sentenced pursuant to that statute rather than the sentencing statute in effect at the time of the commission or conviction of the crime. *Id.* at 742. The commission of the offense clearly occurred before the effective date of the statute. However, Defendant was convicted on June 17, 2005, and was sentenced on August 4, 2005.

In *White*, a panel of this court addressed the issue of whether Ind. Code §35-50-2-1.3 was ameliorative in nature. The defendant in that case proposed that Ind. Code §35-50-2-1.3 provided that the trial court must use advisory sentences whenever it imposed consecutive sentences. Therefore, that defendant argued, the trial court could not

enhance the sentences beyond the advisory sentence for each offense, if the trial court chose to impose consecutive sentencing. The State argued in that case, that the purpose of the statute was to ensure that the consecutive sentences for convictions of non-violent crimes arising out of a single episode of criminal conduct did not exceed the advisory sentence for the next highest felony. This court held that pursuant to Ind. Code §35-50-2-1.3: (1) the advisory sentence for a felony which is one class of felony higher than the most serious of the felonies for which the person has been convicted is the appropriate advisory sentence for an episode of non-violent criminal conduct; and, (2) because the statute imposes no further restrictions on the trial court's ability to impose consecutive sentences pursuant to Ind. Code § 35-50-1-2, the statute is not ameliorative in nature. *Id.* at 743.

Therefore, the issue raised by Defendant has already been decided against him by this court in *White*. Pursuant to the holding in *White*, Ind. Code §35-50-2-1.3 is not ameliorative in nature. The trial court did not err.

The next dispositive issue raised by Defendant is whether the trial court's sentencing statement was sufficient. Sentencing decisions lie within the trial court's sound discretion. *Patterson v. State*, 846 N.E.2d 723, 727 (Ind. Ct. App. 2006). If a trial court uses aggravating or mitigating circumstances to enhance or reduce the presumptive sentence, it must: (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reasons why each circumstance is determined to be mitigating or aggravating; and (3) articulate its evaluation and balancing of the circumstances. *Id.* The trial court is not required to find the presence of mitigating circumstances. *Id.* When

a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are indeed mitigating, and the trial court is not required to explain why it does not find the proffered factors to be mitigating. *Id.* The trial court's assessment of the proper weight of mitigating and aggravating circumstances is entitled to great deference on appeal and will be set aside only upon a showing of a manifest abuse of discretion. *Id.*

In the present case, the trial court's sentencing statement was as follows:

The Court finds that there are aggravating circumstances in this case, including the defendant's previous criminal history, primarily, with warrant (sic) enhances sentences with respect to both of the underlying charges. The Court believes further that the underlying, the aggravating circumstances, warrant consecutive sentences. That being the case in respect to the defendant having been found to have violated the conditions of his suspended sentence, in 797, the court will now revoke the 21 months of suspended sentence, giving the defendant credit for nine months spent pending this disposition and good time credit finds that this sentence has been served entirely. With respect to the defendant being found guilty of criminal confinement, a class B felony, the court now sentences defendant to a period of 18 years imprisonment, with respect the (sic) court finding that the defendant guilty of resisting law enforcement, a class D felony, the court will impose a sentence of three years and with respect to the defendant having been found a habitual offender the court will impose an additional term of 25 years which in total is 46 years. The Court will give the defendant 104 days of credit and good time credit, and order the balance of the sentence into execution at the Indiana Department of Corrections. Making defendant eligible, or recommending the defendant be confined in medium security. The Court will impose an order that the defendant pay costs and fees which the court believes total \$856.00 we will enter those on the court's judgment docket.

Tr. at 554-556.

This sentencing statement does not identify all aggravating and mitigating circumstances, the reasons why the aggravators and mitigators are considered by the trial court to be such, or articulate the evaluation and balancing of the circumstances. Upon

remand, the trial court is directed to issue a more specific sentencing statement taking those requirements into consideration.

Because the sentencing statement is not specific enough for our review, we do not address Defendant's allegation that his sentence is inappropriate.

Reversed and remanded.

MATHIAS, J., and ROBB, J., concur.